



IN THE

Supreme Court of the United States

October Term—1955

No. 23

HARRY SLOCOWER,

*Appellant,**against*THE BOARD OF HIGHER EDUCATION OF THE
CITY OF NEW YORK,*Appellee.***On Appeal from Judgment of the Court of Appeals of the
State of New York****PETITION FOR REHEARING**PETER CAMPBELL BROWN,
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**On Appeal from Judgment of the Court of Appeals of the
State of New York**

PETITION FOR REHEARING

*To the Supreme Court of the United States and the Justices
thereof:*

The Board of Higher Education of the City of New York, the appellee herein, by its counsel petitions this Court for an order granting a rehearing of the above-entitled cause and, in support thereof, respectfully shows:

This Court directed that the judgment appealed from herein be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this Court. The majority opinion refers to the proceedings taken on September 24, 1952, before the Internal Security Subcommittee of the Committee on the Judiciary of the United

States Senate at an open hearing held in New York City at which the appellant Harry Slochower appeared pursuant to a subpoena of the Subcommittee. The majority opinion states *inter alia*:

"Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the College; three days later his position was declared vacant 'pursuant to the provisions of Section 903 of the New York City Charter.' It appears that neither the Subcommittee nor Slochower was aware that his claim of privilege would *ipso facto* result in his discharge, and would bar him permanently from holding any position either in the city colleges or in the city government."

The majority opinion herein held that the discharge of appellant Slochower, under the circumstances outlined in the opinion, was a violation of due process. The majority opinion apparently predicated that conclusion in large part upon the asserted fact that "neither the Subcommittee nor Slochower was aware that his claim of privilege would *ipso facto* result in his discharge". It is submitted that that statement of fact, which appears to be one of the cornerstones of the majority opinion, is not supported by the record. Moreover extrinsic evidence, in the form of public documents and reported court cases, affirmatively indicates the exact opposite of the fact as thus asserted:

If the second sentence of the above-quoted excerpt is intended to mean that neither the Subcommittee nor Slochower was aware of the existence of Section 903 of the New York City Charter, there is nothing in the record to support any such inference. If the second sentence of the above-quoted excerpt is intended to mean that neither the Subcommittee nor Slochower was aware of the legal consequences under Section 903, which would flow from Sloch-

ower's invocation of the privilege against self-incrimination before a Congressional Committee whose inquiry was not specifically directed at "the property, government or affairs of the city or * * * official conduct of any officer or employee of the city", the record does not contain any evidence to support such an inference.

With respect to extrinsic evidence in the form of other court decisions, Section 903, which took effect on January 1, 1938, had been the subject of litigation on at least several occasions long prior to the hearing held by the Subcommittee on September 24, 1952. As pointed out in our main brief herein (p. 24, footnote), prior to Slochower's appearance before the Subcommittee, Section 903 had been held applicable to an employee of the Board of Higher Education who declined to sign a waiver of immunity when subpoenaed to appear at a public hearing of the Joint Legislative Committee to Investigate the Educational System of the State of New York on April 23, 1941. *Matter of Goldway v. Board of Higher Education*, 178 Misc. 1023 (Sup. Ct., New York County, 1942). Incidentally, the appellant Slochower had appeared and testified before the same Joint Legislative Committee at about the same time (Record p. 28).

As also pointed out in our main brief herein (p. 24, footnote), prior to Slochower's appearance before the Subcommittee, Section 903 had been judicially interpreted to apply to an employee of the Board of Education who invoked the Fifth Amendment when questioned by the Committee on Un-American Activities of the House of Representatives concerning membership in the Communist Party. *Matter of Koral v. Board of Education of City of New York*, 197 Misc. 221 (Sup. Ct., New York County, 1950).

The decision in the *Goldway* case in 1942 and the decision in the *Koral* case in 1950 indicated that Section 903 was applicable to employees of both the Board of Education

and the Board of Higher Education; that it applied to investigations conducted either by a committee of the State Legislature or a Congressional Committee; and that questions relating to membership in the Communist Party were within the scope of Section 903 as relating to the official conduct of an employee and the property, government and affairs of the city.

Moreover, the testimony of other witnesses taken before the Subcommittee confirms the fact that both the Subcommittee and the appellant Slochower were aware of the existence of Section 903 of the Charter and the consequences that would flow from the refusal of any witness before the Subcommittee to testify on the ground that such testimony would incriminate him.

On September 9 and September 10, 1952, which was prior to the date when the appellant Slochower testified before the Subcommittee, hearings were held by the Subcommittee in New York City at which it heard testimony of George Timone, a member of the Board of Education of the City of New York and Chairman of the Law Committee of the Board. Mr. Timone called to the attention of the Subcommittee and discussed with its chairman, Senator Ferguson, Section 903 of the New York City Charter. While neither Mr. Timone nor Senator Ferguson referred to Section 903 by its number their discussion obviously related to that section.

The testimony of Mr. Timone before the Subcommittee is annexed hereto as part of the Appendix, and made a part hereof. (*Hearings before the Subcommittee to investigate the administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary United States Senate Eighty-second Congress Second Session on Subversive Influence in the Educational Process*, United States Government Printing Office Washington: 1952, part 1, pp. 40-48, 49-51).

The particularly relevant portion of Mr. Timone's testimony given on September 9, 1952, reads as follows (id. p. 41):

"Mr. Timone. * * * Now, here is what the board of education has done, Senator: In February 1941, we dismissed eight teachers. Those teachers were dismissed following a careful investigation by the corporation counsel, following hearings that the corporation counsel, John P. McGrath, himself conducted.

Senator Ferguson: Does this case that I read about in the paper, of requiring city employees or government employees to testify before boards or commissions under a particular charter provision, or ordinance, does that now apply to school teachers?

Mr. Timone. Our view is that it does apply to school teachers, and we always took that view.

And it is comforting to have the court of appeals now definitely say that it does. I think that was an aid to us.

Senator Ferguson. In other words, if a witness refuses to testify before a board of education or a properly qualified board, he can be dismissed?

Mr. Timone. Yes, sir.

Senator Ferguson. That is a cause for discharge?

Mr. Timone. Yes, sir.

Senator Ferguson. Does this apply even though the witness says, 'I refuse to testify on the grounds that it would tend to incriminate me?'

Mr. Timone. Our view is that it does.

Senator Ferguson. In other words, the right of employment is not an absolute right?

Mr. Timone. That is right.

Senator Ferguson. The right to have a public job is not an absolute right, but it is discretionary upon certain conditions, and one of the conditions is that you answer fully any questions that the boards or the various commissions desire to ask?

Mr. Timone.. That is true, Senator.

I think that is the effect, too, of the decision of the United States Supreme Court in March of this year in sustaining the Feinberg order."

On March 11, 1953, which was subsequent to the date of the appellant Slochower's testimony before the Subcommittee, another hearing was held in Washington, D. C. at which the Subcommittee heard testimony of Harry D. Gideonse, president of Brooklyn College, where the appellant Slochower had been employed. Dr. Gideonse referred specifically to Section 903 of the New York City Charter and to the fact that failure to testify in an investigation would result in an automatic discharge under that section. Dr. Gideonse stated that the seven members of the faculty of Brooklyn College who had been called to appear before the Subcommittee had been advised of the effect of Section 903 in the event that they refused to answer questions before the Subcommittee. The name of appellant Slochower was specifically referred to on several occasions during the testimony of Dr. Gideonse, who stated in substance that appellant Slochower, prior to Slochower's appearance before the Subcommittee, had consulted with him.

The testimony of Dr. Gideonse before the committee is annexed hereto as part of the Appendix and made a part hereof (id., part 4, pp. 547-575). The particularly relevant portion of Dr. Gideonse's testimony given on March 11, 1953, reads as follows (id. pp. 548-549) :

"Mr. Morris. Will you tell us in general about the work of the seven professors who have been brought down here to appear before the Internal Security Subcommittee? Did you know, for instance, that they were coming down, that they had been subpoenaed?

Dr. Gideonse. Yes, I think I knew it of all, because the staff of this Senate committee has been very care-

ful in preparing and checking with regard to cases of that sort, in part with me and my office.

Mr. Morris. Have you followed the proceedings here? Have you followed the work of the subcommittee?

Dr. Gideonse. Yes, I have followed it quite closely.

Mr. Morris. When you knew that a particular professor or member of the faculty from your university appeared, did you send for a transcript of the hearings?

Dr. Gideonse. That is right.

Mr. Morris. I wonder if you would tell the committee what steps you have taken when you have come to know that a particular member of your faculty has invoked his privilege against incrimination before this Internal Security Subcommittee?

Dr. Gideonse. The question is a very broad one. I would like to go into the background a little.

In general, of course, the suspending of a teacher under the State tenure law in New York State requires all the provisions of the State tenure law and of the bylaws of the board of higher education. That means that there have to be specific charges, trial committees, and so on. But these particular cases are special because they fall under the charter of the city of New York, article 903, which for a long time now—I think the first case of that sort goes back to 1941, as far as the board of higher education is concerned—has been held to mean in court interpretation that a witness who, as an officer of the city of New York, pleads self-incrimination as an excuse for not answering questions about what he does in his official capacity, has automatically by that very plea, as he spoke those words, discharged himself. In other words, that clause has been held to be self-executing. So all that happens under that particular provision is that after a survey

of the transcript has made it clear that that is the kind of testimony that really was given, that testimony is recognized as a fact that took place in the light of the prevailing law.

In other words, the dismissal is really recognized as having taken place when the testimony was offered; and all these men knew that, because they had all been warned of that before they went down."

Appellant Slochower and Section 903 were referred to on several other occasions in the course of Dr. Gideonse's testimony (see *id.*, pp. 552-554).

Dr. Gideonse's testimony continued as follows (*id.*, pp. 560-561):

"Senator Smith. Have you suspended or did you suspend all the members of your faculty who refused to answer the questions of the committee?

Dr. Gideonse. I believe in every single case we did that, Senator.

Mr. Morris. The seven faculty members who have appeared here are Harry Slochower, Sara Riedman, Melba Phillips, Frederick Ewen, Murray Young, Elton Gustafson, and Joseph Bressler. They are the seven members of your faculty who have appeared before this Internal Security Subcommittee.

Dr. Gideonse. Yes, sir * * *

Mr. Morris. Doctor, what I was trying to bring out was, have they in fact denied to you being members of the Communist Party?

Dr. Gideonse. Yes, several of those people have.

Mr. Morris. And yet when they appear before a properly constituted tribunal such as this Senate Internal Security Subcommittee, they have invoked their

privilege under the fifth amendment rather than put a denial on the record.

Dr. Gideonse. I can tell you about one of these colleagues in some detail.

Mr. Morris. Will you do that, please?

Dr. Gideonse. He was a gentlemen that I thought probably had an affiliation in terms of what we knew about him in the Rapp-Coudert days, and a faculty committee also had some suspicion about this. He was a good scholar, and with his students an effective teacher.

The time came when he was ready for promotion in terms of a comparison with other colleagues. Of course, the issue arose, since you can't prove these doubts, should we not waive them? Which is truly a very effective argument, and certainly in line with the old American tradition that you must be proved innocent until—et cetera. So a faculty committee was set up to look into the merits of the case, and in that case the faculty committee did a very thorough job for a faculty committee that cannot do an investigation of the FBI sort. They came to the conclusion, after much heart-searching, that this story about this man was probably untrue, but they had these doubts. So they made him write out, with his signature under it, very solemnly, all the things that he had told the committee about never having been and not now being a member of the party, and that was signed.

Then he was called a couple of years later—and we promoted him, by the way.

Mr. Morris. Are you going to name this man for us?

Dr. Gideonse. Yes. You have him.

Mr. Morris. Which one is that?

Dr. Gideonse. That is Professor Slochower.

When this particular gentleman was called, he came in to get advice from me, and I told him, 'I don't see

that you have a problem. You have told the faculty committee and you have told me that you were not and never have been. We have that from you in writing. You assured all your colleagues. You have led them all to believe that. All you have to do is go and tell that committee just exactly what you have told us and what we have in writing from you.'

His reply to me was, 'If I do that there, they will prove perjury on me.'

That gives you a picture of the kind of morale that we are dealing with. These are not issues that are worthy of being considered by anyone who is really professionally interested in academic freedom. This is the academic gutter."

WHEREFORE upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the judgment of this Court reversing the order of the Court of Appeals of the State of New York be vacated and that the aforesaid order of the Court of Appeals be, upon further consideration, affirmed.

May 2, 1956

Respectfully submitted,

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Certificate of Counsel

I, PETER CAMPBELL BROWN, counsel for the above-named appellee, the Board of Higher Education of the City of New York, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and is in my opinion well-founded in law and in fact and proper to be filed herein.

PETER CAMPBELL BROWN,
Counsel for Appellee.